United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1583

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

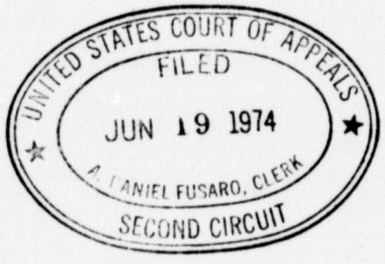
VINCENT ROLLINS,

Appellant.

Docket No. 74-1583

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether Officer Martinez was a competent witness and whether the District Judge erred by refusing to order a mental examination of him.

2. Whether the Government proved beyond a reasonable doubt that appellant was predisposed to commit the crimes with which he was charged.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Harold R. Tyler, Jr.) rendered on April 26, 1974, after a trial without a jury, convicting appellant Vincent Rollins of two counts of possession of heroin with intent to distribute, in violation of 21 U.S.C. §§812, 841 (a)(1), 841(b)(1)(A).

Imposition of sentence was suspended and appellant was placed on probation for a period of five years.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.*

Statement of Facts

Vincent Rollins was accused of making two small sales of heroin to an undercover agent, Charles Martinez.

Prior to trial, defense counsel requested that Martinez, who had suffered a severe head injury since the

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*At trial Mr. Rollins was represented by Murray Mogel, Esquire, head of The Legal Aid Society, Federal Defender Services Unit, trial offices.

events of this case occurred,* be given neurological and psychiatric examinations, pursuant to Rule 28 of the Federal Rules of Criminal Procedure, to determine whether Martinez was a competent witness (3**). Counsel informed Judge Tyler that Martinez's injury of July 1973 was so serious that Martinez spent much time in the hospital, was transferred from his undercover assignment to clerical duties, and suffered serious memory lapses (3-5). The Judge denied counsel's request for a Rule 28 examination, ordered the Government to make Martinez's police department medical reports available to defense counsel, and stated that he would make further rulings on Martinez's competency to testify during or after Martinez's testimony (5-10, 18).

Martinez was the Government's principal witness at trial. He related that on October 28, 1971, he was working as an undercover agent. Near a boutique called the Outhouse on Melrose Avenue in the Bronx, an informant introduced Martinez to Mike*** for the purpose of buying heroin (20).

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*The heroin sales in this case occurred during November 1971 and January 1972; trial commenced on March 18, 1974. The lengthy delay was necessitated by two appeals to this Court on the issue of whether appellant was deprived of a speedy trial under the Prompt Disposition Rules.

**Numerals in parentheses refer to pages of the trial transcript. See also minutes of pre-trial hearings on January 15, 1974, and January 31, 1974.

***Martinez stated that the police were never able to identify Mike or arrest him for his role in the heroin sale (65).

According to Martinez, he left the area with the informant, returned shortly, and was introduced to appellant, who offered to sell heroin (23). At that time, appellant wrote his name and the telephone number of the Outhouse on a piece of paper (23-25). On November 1, 1971, Martinez telephoned appellant to make an appointment for the buy, and on November 2, 1971, he met Mike and appellant near the Outhouse (26-27).

After the three men met, they went to a nearby apartment where Martinez waited while Mike and appellant went for the heroin (27). When Mike and appellant returned, according to Martinez, Mike handed a package to appellant, who gave it to Martinez (29). Martinez then gave $450 to Mike (30).

Martinez next testified that, on his own volition, he called appellant on January 25, 1972 (33). Later that night he met appellant near the Outhouse, where appellant took Martinez for a short ride in his car and sold him one ounce of heroin for $800 (34-36).

On cross-examination, Martinez conceded that because of his accident he was unable to recall the details of his dealings with appellant. He stated that his narration of the events of the case was based almost exclusively on memorization of notes made contemporaneous with the events:

[MR. MOGEL]: Did you recol-

lect that something happened at 2:25 in the afternoon on October 28th before you read [your notes]?

A. No.

Q. You did not.

Did you remember any of the times and dates until you read these two?

A. No.

Q. These two documents?

A. No.

Q. Did you know that all of this happened in October of 1971?

A. Before I read my material?

Q. Yes.

A. I would have to be honest and say no.

Q. Did you know it happened in January of 1972 before you read the material?

A. No.

Q. So you have no recollection?

A. You try to just push it out of your mind.

Q. What you are testifying to then is what you read, is that correct?

A. Yes.

Q. Your past recollection as you recorded it?

A. That is correct.

(58-59).

Martinez professed to remember some of the events of his conversations and meetings with appellant (59-60), but admitted that following the memorization of his reports and those of the surveillance agents he could not distinguish between the little he actually remembered and the material gleaned from the reports:

> [MR. MOGEL]: You told me before you couldn't remember offhand what happened in October of '71 or January of '72?
>
> A. That is correct.
>
> Q. Without these reports?
>
> A. That is correct.
>
> Q. And that you can't separate what in your testimony is recollection and what came from the reports, is that accurate?
>
> A. It's hard to differentiate. I would say yes.

(62).

Martinez also conceded that he couldn't recall other important events from 1971-1973, such as other cases he had worked on (42), testifying before the grand jury in this case (39), and accusations made against him by his superiors of misconduct during duty (45-49). In fact, Martinez could not remember whether his accident occurred in July, August, or September 1973 (49-52).

Following the conclusion of the Government's case,*

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*Additional testimony for the Government was given by

defense counsel moved for a judgment of acquittal on the ground that Martinez's inability to recall the details of his dealings with appellant rendered Martinez an incompetent witness. He further argued that Martinez's memory failure deprived appellant of his Sixth Amendment right of confrontation (108). Judge Tyler denied the motion, ruling that Martinez suffered from only ordinary difficulties of recollection (109-110).

Appellant testified extensively on his own behalf. He admitted being addicted to heroin for twenty years,* but urged that he never sold heroin and was entrapped by Martinez into making these sales.

Appellant stated that on October 28, 1971, he was walking after work to the Outhouse, where he often visited the proprietor, Mario Disdiel (117). He related that he also purchased heroin for his own habit in that neighborhood (120). On that day he was hailed by Tony, an addict acquaintance (in reality an informer), who introduced Martinez as "Flocco," his addict cousin from Philadelphia who had just been released from prison and needed heroin (123). Also there was Mike.

Officer Lawrence LaBriola of the Joint Task Force, who operated as a surveillance agent (81-105).

*Appellant, forty years old, admitted snorting heroin twice a day for twenty years. During that time, however, he spent two and a half years at engineering college, four years on active duty in the Air Force, ten years as a design draftsman, and was most recently employed as a meat inspector for the Department of Agriculture (111-16).

Appellant next testified that Martinez called him several times after October 28 and reached appellant on November 1, 1971. According to appellant, Martinez said that he had been unable to find a heroin supplier and asked appellant's assistance (124). On November 2, 1971, allegedly lacking a source for the amount of heroin required by Martinez, appellant assisted Mike in making a buy for Martinez (124-25). Appellant claimed to have received no money for the deal (127).

According to appellant, Martinez then began to call very often, either at the Outhouse or at his home. Finally, in January 1972, appellant agreed to find an ounce of heroin for Martinez out of the sympathy one addict often feels for another (128-29). Appellant stated that he got this heroin from his own pusher, Andre, and gave Andre the entire proceeds of the sale (131).

Also testifying for the defense were Stephen DeLucca, an employee of the Outhouse, who related that he received many calls from Flocco, all of them for appellant (161-69); and Elinor Carter, appellant's girlfriend, who stated that she received many calls from Flocco at appellant's apartment (178-84).

Following the conclusion of the evidence, defense counsel moved for acquittal on the ground that the Government had failed to show that appellant had a predisposition to commit the crimes (185).

Judge Tyler denied the motion (186) and found appellant guilty on both counts.

ARGUMENT

Point I

OFFICER MARTINEZ WAS AN INCOMPETENT WITNESS WHOSE TESTIMONY SHOULD HAVE BEEN STRICKEN. FURTHERMORE, THE JUDGE ERRED BY REFUSING TO ORDER A MENTAL EXAMINATION OF MARTINEZ.

Officer Charles Martinez, the Government's principal witness,* was an undercover agent who purchased narcotics from appellant. On direct examination he gave a narrative account of two purchases, one in November 1971 and the other in January 1972.

On cross-examination, however, Martinez admitted that, because of a head injury he had sustained in July 1973, he had virtually no memory of the events which occurred in October 1971 and January 1972:

> [Defense counsel]: Did you recollect that something happened at 2:25 in the afternoon on October 28th before you read Government's Exhibit 3510 [Martinez's reports]?

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*The Government's other witness, Officer LaBriola, merely observed Martinez's activities from a surveillance vehicle.

A. No.

Q. You did not?

Did you remember any of the times and dates until you read these two?

A. No.

Q. These two documents?

A. No.

Q. Did you know that all of this happened in October of 1971?

A. Before I read my material?

Q. Yes.

A. I would have to be honest and say no.

Q. Did you know it happened in January of 1972 before you read the material?

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Q. So you have no recollection?

A. You try to just push it out of your mind.

Q. What you are testifying to then is what you read, is that correct?

A. Yes.

Q. Your past recollection as you recorded it?

A. That is correct.

(58-59).

Martinez stated that he vaguely remembered, for example, the initial meeting with appellant, but readily

conceded that he had no recollection of the time, place, and details of the conversation:

> [Defense counsel]: You recollected [the meeting] after you read [your report]?
>
> A. Some of it I recollected before.
>
> Q. The meeting on the street, things like that?
>
> A. Yes.
>
> Q. You recollected no details of the conversation?
>
> A. I did not.

(60).

According to Martinez, the narrative account of his transactions with appellant given on direct examination was based almost exclusively on his memorization of his contemporaneous notes and the notes of the surveillance agents:

> [Defense counsel]: You told me before you couldn't remember offhand what happened in October of '71 or January of '72?
>
> A. That is correct.
>
> Q. Without these reports?
>
> A. That is correct.
>
> Q. And that you can't separate what in your testimony is recollection and what came from the reports, is that accurate?
>
> A. It's hard to differentiate. I would say yes.

(62).

Martinez's inability to remember the events surrounding the two sales of heroin rendered him an incompetent witness:

> A person is competent as a witness when he has the capacity to retain in memory the event perceived by him [and] to narrate such event accurately.... Absent such capacity, he is incompetent, without regard to the kind or degree of incapacity.
>
> 3 Wharton's Criminal Evidence, §373 (13th ed. 1972).

See also 2 Wigmore Evidence, §494 (1940); 3 Jones On Evidence, §20.9 (1972); McCormick On Evidence, §62 (1954); District of Columbia v. Armes, 107 U.S. 519 (1882).*

Martinez did not use his notes to "refresh" his memory; he memorized his notes prior to trial to compensate for virtually total memory failure concerning the significant aspects of his dealings with appellant.**

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*In District of Columbia v. Armes, supra, 107 U.S. at 521-22, a damages action, a person fell at the site of a sidewalk construction and sustained head injuries resulting in partial memory loss. The Supreme Court ruled that a person so afflicted is a competent witness if he

> ... [is] capable of giving a correct account of the matter which he has seen or heard in reference to the questions at issue.

**Also on cross-examination, Martinez admitted that his accident had deprived him of the ability to remember in detail his other past cases. He couldn't recall, for example, the details of another case he had worked on in January 1972 (42), or that he had been accused by his superiors of misconduct in relation to a 1972 heroin buy (43-48), or that he had testified before the grand jury in this case (39). In fact, Martinez could not remember whether his ac-

Because Martinez lacked memory of his dealings with appellant, trial counsel was truly unable to "test the recollection and sift the conscience of the witness" (Mattox v. United States, 156 U.S. 237, 242-43 (1895)), by cross-examination. In effect, Martinez's testimony was hearsay: he admittedly was unable to "affirm, deny, or qualify the truth of the prior statement under penalty of law." California v. Green, 399 U.S. 149, 158-59 (1970). Thus, appellant was denied his Sixth Amendment right of confrontation:

> ... The mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.
>
> Dutton v. Evans, 400 U.S. 74, 89 (1970).

Despite Martinez's admissions that he could remember none of the details of his dealings with appellant, Judge Tyler ruled that Martinez was a competent witness:

> ... Martinez' demeanor and responses to the questions placed to him on direct and cross and as well by the judge indicated

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cident had occurred in July, August, or September 1973 (49-52). Martinez also conceded that he had been in and out of the hospital ever since his accident, for tests and treatment, that he suffered every day from vertigo, and that he had been transferred to a clerical job.

> that it is true without refreshing his recollection as to the events which took place over two years ago was very difficult, if not impossible for him, but the same was true of Detective LaBriola, who admitted that he wasn't too clear on any of the dates, the hours, and the details without refreshing his recollection by reading his reports.
>
> (109).

The Judge, however, misconstrued counsel's arguments concerning Martinez's memory. The problem was not that he had forgotten the precise time and duration of brief meetings two years previously, but that, lacking true recollection of the details and substance of the meetings, he was unable to be examined concerning appellant's defense of entrapment.

Appellant's defense was gravely prejudiced by Martinez's inability to recall the details of his meetings and conversations with appellant. Appellant's defense was entrapment. He did not claim "innocence" and deny the transactions alleged by Martinez. Rather, he admitted his involvement with Martinez, but sought to excuse his acts on the ground that Martinez pressured him into obtaining heroin. At issue, then, were the subtleties of the conversations between appellant and Martinez: who first proposed a sale, whether appellant resisted obtaining the heroin, and whether Martinez relentlessly urged him to consummate a deal. Appellant testified that Martinez, posing as an addict from Philadelphia who had just been released from prison, asked him to

obtain heroin for Martinez and pressed him strenuously for a deal. He stated that he tried to dissuade Martinez, but finally agreed to find the heroin because, as a fellow addict, he felt sorry for Martinez. At the time of trial, Martinez was truly unable to contradict appellant's assertions.

Judge Tyler also erred by denying defense counsel's repeated requests that Martinez be examined by a medical expert, specifically on the issue of memory, pursuant to Rule 28 of the Federal Rules of Criminal Procedure. Although the ordering of expert examinations is "particularly" within the discretion of the trial judge, United States v. Lee Wan Nam, 274 F.2d 863, 864 (2d Cir.), cert. denied, 363 U.S. 803 (1960), that discretion was abused here because defense counsel elicited sufficient information on cross-examination to doubt Martinez's ability to recall the events in question.

Since Martinez's testimony was the exclusive basis of the Government's case against appellant, and since Martinez admitted to serious memory difficulties, Judge Tyler should have granted defense counsel's request for an expert examination.*

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*This is far from a case like United States v. Russo, 442 F.2d 498 (2d Cir. 1971), cert denied, 404 U.S. 1023, rehearing denied, 405 U.S. 949 (1972), where this Court sustained the trial judge's refusal to order an examination for the witness Itkin. There, Itkin had only briefly consulted two psychiatrists because of marital problems, and primarily in relation to his wife's treatment. Id., at 503.

Point II

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS PREDISPOSED TO COMMIT THE CRIMES CHARGED.

Appellant's defense to the crimes charged was entrapment. He testified that he was approached by an addict acquaintance (in fact a government informer) who asked him to obtain heroin for the informer's cousin "Flocco" (Officer Martinez), allegedly an addict recently released from prison. Appellant related that he resisted the suggestion, but finally agreed to help Mike, another addict acquaintance, obtain heroin for Martinez. The first sale, according to appellant, was consummated on November 2, 1971, and consisted of heroin sold by Mike to Martinez. Appellant testified that he received no share of the proceeds of that sale.

Appellant next testified that Martinez called him continuously from November 1971 to January 1972, when he relented and agreed out of sympathy to a fellow heroin addict to try to obtain heroin. Appellant got the heroin from his own pusher, Andre, and related that he gave the entire purchase price to Andre, hoping only that Andre might give him a break should he ever be short of funds to support his own habit.

Thus, at minimum, appellant was induced by the Government to commit the crimes. See United States v. Riley,

363 F.2d 955, 958 (2d Cir. 1966); United States v. Jones, 360 F.2d 92, 96 (2d Cir. 1966); United States v. Pugliese, 346 F.2d 861, 863 (2d Cir. 1965); United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952). The Government, therefore, was required to prove beyond a reasonable doubt that appellant was predisposed to commit the crime. United States v. Russell, 411 U.S. 423 (1973); United States v. Ortiz, Doc. No. 73-2523, slip opinion at 3269 (2d Cir. May 6, 1974); United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. filed, 42 U.S.L.W. 3474 (January 7, 1974); United States v. Sherman, supra.

Proof of a person's predisposition to commit the crime at issue may be shown in three ways: "by evidence of his past offenses, of his preparation, even of his 'ready complaisance.'" United States v. Sherman, supra, 200 F.2d at 882. Here, there was no evidence that appellant had ever sold heroin before; nor was there any evidence of an elaborate selling scheme.

The evidence developed below failed to establish beyond a reasonable doubt appellant's "ready complaisance" to sell heroin. The facts here are similar to those in United States v. Sherman, supra.* Sherman, like appellant,

*In Sherman, this Court reversed and remanded for a new trial. Sherman was then retried, convicted, and the conviction was affirmed by this Court (240 F.2d 949). The Supreme Court granted certiorari and reversed on the merits, Sherman v. United States, 356 U.S. 369 (1958).

was a heroin addict who had never previously sold heroin, had no heroin in his possession other than that required for his personal habit, received no profit from the sale, and was acting to help an alleged fellow addict. See Sherman v. United States, 356 U.S. 369, 375 (1958).

Here, there was no "criminal design," no "would-be violator of the law to expose." Sorrells v. United States, 287 U.S. 435, 441-42 (1932). Appellant was merely picked at random by an addict informer who knew him to be an addict, not a seller, and was turned over to an undercover agent seeking to create a buy. Far from being predisposed to sell heroin, appellant was merely moved by the sympathy one addict commonly has for another.

Judge Tyler's ruling that appellant

> ... had a predisposition to traffic in heroin hydrochloride and that he was by no means entrapped by any excessive entreaties or other misconduct or pressure or coercion on the part of the undercover agent or the informer....
>
> (189),

was unsupported by the record. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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